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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

NO. 881

GEORGE HARRIS, ET, AL.,

Petitioners,

versus

L. C. HAMMOND, OPERATING AND DOING BUSINESS AS L. C. HAMMOND & COMPANY,

Respondent.

Petition for Writ of Certiorari and Brief in Support of Same.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

NO. _____

GEORGE HARRIS, INDIVIDUALLY AND AS THE DESIGNATED AGENT IN WRITING OF ELLIS DANIEL,

PETITIONER.

VS.

L. C. HAMMOND & COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner George Harris, individually and as the designated agent in writing of Ellis Daniel, respectfully shows to the court:

STATEMENT OF MATTER INVOLVED:

1. The Proceedings In The Lower Courts:

This petition for a writ of certiorari is sought to review a final judgment of the Circuit Court of Appeals for the 5th Circuit, which court affirmed a final judgment of the United States District Court, Southern District of Georgia, Augusta Division, Honorable Archibald B. Lovett, presiding.

The action brought by petitioner herein was to recover the minimum wages provided for under the Fair Labor Standards Act of Congress, from the employer, L. C. Hammond & Company, whom it was alleged was a wholesale merchant actively and extensively en-

gaged in interstate commerce, and in connection with which business petitioners were exclusively employed; that their employer had willfully evaded the law and refused to pay said minimum wages and was indebted to petitioners in the sum of $9,722.18 (R.2).

The defendant answered denying that he was engaged exclusively in the wholesale business in commerce, and alleged that he was primarily engaged in a retail establishment (R.7).

Petitioners failed to demand a jury trial and the case was tried by his Honor, the District Judge, the Honorable Archibald B. Lovett.

2. The Facts Of The Case

The substantial uncontradicted documentary and other evidence adduced are as follows: During the period of petitioners' employment, to-wit: On February 15, 1939, the defendant made an affidavit to procure a business license to do a wholesale business only, and in which affidavit he swore that he did a wholesale business only (R.33).

On January 18, 1940 during petitioners' employment the defendant made another affidavit to procure a license to do a wholesale business only, and in which he swore that he did a wholesale business only (r.34).

The defendant testified that the City of Augusta, Georgia licensed him to do a wholesale business only (R.23). His delivery trucks and stationery advertised him as a wholesale merchant only (R.11-15). He advertised himself in Augusta, City Directories and telephone directories as a wholesale merchant only (R.26). His only retail business was done in the office space of his wholesale business measuring 35 x 40 feet. His office and warehouse extended through a city block.

He purchased from eight or ten commission brokers, representing manufacturers and producers, and in carload lots, various

kinds of groceries, feeds, cement and hardware, shipped to him in interstate commerce (R. 12-17). During the period of petitioners' employment defendant had as regular customers 143 retail merchants, 71 of whom were in the State of South Carolina, and 82 in the State of Georgia (R.33). Petitioner and McDaniel worked 76 hours per week for which they received $11.00 per week or approximately 14¢ an hour straight time (R.16).

Petitioner and McDaniel, as warehousemen worked practically all the time in the warehouse, hauling in by trucks interstate shipments from railroads, and delivering by truck from the warehouse consignments of goods sold by defendant to retail merchants in South Carolina and Georgia (R.14-17). Defendant at all times had a traveling salesman who sold goods to retail merchants in wholesale quantities (R. 10).

During the trial of the case in the District Court and while petitioners were proceeding to prove by retail merchants, who were customers of the defendant, the volume of wholesale business done by defendant in commerce, his Honor the District Judge cut short petitioners' proof by the following ruling, duly excepted to by petitioners:

By the Court: "Are these witnesses Mr. Chance for the purpose of establishing the character of business as wholesale or retail?" Mr. Chance: "To show that they were primarily purchasing goods from Hammond as a wholesale merchant in volume". By the Court: "I will limit you to three witnesses. It is cumulative testimony". (R.19).

During the trial his Honor the District Judge elicited from defendant the following hearsay testimony: By the Court: "There was some reference made to the Wage and Hour people calling on you, do you remember the date?" A. "Not definitely". The

Court: "Don't you know the year?" A. "I think it was in the Fall of 1939". The Court: "That would be about a year after the law went into effect". A. "Yes sir". The Court: "Did they leave or write any letter or have any document showing how they interpreted your business and whether it was subject to the Act?" A. "No sir," the only thing Mr. Boye contacted us and we talked." The Court: "What was the Inspector?" A. "Yes sir". The Court: "Did the Inspector tell you whether you were classified as a retailer or a wholesaler?" A. "no sir, just said we were doing a little less than 20% of wholesale."

3. Decision Of The District Court

Under the heading "DISCUSSION" wherein the District Judge begins his decision against petitioners he says: "There are two questions for decision. The first is are those employees engaged in a retail establishment, the greater part of whose selling is in intrastate commerce, with respect to whom by Section 13 (a) (2) of the Act, Sections 6 and 7 are made applicable. Secondly, if they are not, if the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly in commerce and entitled to invoke the Act for all of the services they rendered, or only where the service had some immediate relationship to interstate commerce?" (R.39).

"By the express terms of the Act, Congress said that the provisions of Sections 6 and 7 relating to minimum wages and overtime compensation should not apply with respect to (2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce. As to wholesalers, all phases of this business selling intrastate are not necessarily covered by the Act, because the purchases are made interstate." (R.39-40).

The trial Court decided that the defendant conducted a retail establishment in connection with their wholesale business, and that petitioners were precluded under the Act, but he concludes as follows:

"But there are other aspects of the case which for the future guidance of the parties properly may be discussed briefly. One of these relates to the overtime compensation claimed by the truck driver and his helper while engaged in hauling goods from the railroads to the defendant's warehouse. While so engaged for a substantial portion of the time, if it had been a wholesaler, they would have been engaged in interstate commerce and within the coverage of the minimum wage provisions of the Act, but without the overtime provision."

4. The Appeal Proceedings Below.

From the final judgment of the District Court, dated August 28, 1943, petitioner entered an appeal to the Circuit Court of Appeals for the 8th Circuit, and in connection with which the following occurred:

April 20, Final Judgment for Defendant (R.46).

October 14, Notice of Appeal served and filed (R.47).

October 14, Assignment of Errors served and filed (R.48).

October 14, Designation of record on Appeal served and filed (R.54).

October 14, Appeal allowed (R. 53).

October 30, Certificate of Clerk to record (R.56).

5. Decision Of Circuit Court Of Appeals.

In a short two page decision the Circuit Court of Appeals affirmed the judgment of the trial court, without reference to or a discussion of any question or issue raised by appellant's assignment of errors. (R.58).

6. Jurisdiction of This Court.

The statutory provisions relied upon to sustain the jurisdiction of this court is the Acts of Congress know as the Fair Labor Standards Act (29 USCA Sec.201, et sequitur), under authority of which this action was brought.

7. Questions Presented.

(a). Where an employer is admittedly engaged in the wholesale purchase, sale and distribution of goods, wares and merchandise in commerce, and has employees who work exclusively in that business, do such employees come within the minimum wage provisions of the Fair Labor Standards Act?

(b) May such an employer avoid the provisions of said Act, where he also maintains in the office space of his wholesale business a small retail stock which he sells at retail, but in which his wholesale employees have no duties to perform?

(c) Is the following statement which the trial court used as the premise for his rulings, a correct statement: "If the defendant is a wholesaler, are these employees covered by the Act in all of their activities; were they wholly in commerce and entitled to invoke the Act for all of the services they rendered, or only where the service had some immediate relationship to interstate commerce."

(d) Where upon the trial of such a case, an issue is raised by the defendant as to the volume of wholesale business done in commerce, and the plaintiff is proceeding to prove the volume of wholesale business, was it error for the trial court to limit the plaintiff's proof as to such volume of wholesale business on the ground that it was cumulative, and having done so, then apply the de minimis doctrine to defendant's wholesale business in commerce?

(e) May a trial court elicit from a defendant purely hearsay and opinionative testimony and accept such in preference to unquestioned documentary evidence and the testimony of three fair and unimpeached witnesses?

3. The Reasons Relied Upon For Allowance of The Writ of Certiorari.

It is respectfully submitted that this Honorable Court should take up this case and reverse the decision of the Courts below because:

(a) Petitioner respectfully submits that it is of utmost importance to the courts and to other wholesale industries at large that the main question presented should be settled by this Honorable Court, to-wit: May a wholesale merchant engage in unfair competition with other like industries by employing labor at sub-standard wages ($11.00 for 76 hours of labor) and thus avoid the letter and spirit of the Fair Labor Standards Act, simply by conducting a small retail business in the office of his wholesale business? If so, then all similar industries may with ease avoid the whole scheme and purpose of the Act, and may be justified if some are permitted to do so.

(b) This case presents a fair sample of the disregard with which this Act is treated by employers as regards certain unfortunate underprivileged persons, and for whose benefit the small minimum wage provisions of the Act were intended.

(c) The Circuit Court of Appeals in a very few words affirmed the judgment of the trial Court, without reference to any question or issue of law or fact relied upon by petitioner.

(d) The judgment of the trial Court, affirmed by the Circuit Court, is manifestly erroneous in that it rest upon the erroneous assumption that irrespective of the fact that petitioners were employed and worked exclusively in respondent's wholesale business they were not within the coverage of the Act because the defendant operates a "retail establishment" in the office of their wholesale business. Under the Act and the decisions of this Court

construing the same, it now appears to be settled law that it is the character of services rendered by the employee and not the business of the employer which determines the applicability of the Fair Labor Standards Act: Walling vs. Jacksonville Paper Co., 317 U.S. 564; 63 S.Ct. 332; Kirschbaum vs. Walling, 316 U.S. 517.

(e) The undisputed facts as to the character of work performed by these colored laborers as warehousemen and truck drivers, brings the case squarely within the rulings of this Honorable Court in the following cases, which the Circuit Court of Appeals did not refer to, and wherein it was held that the receipt of, and the loading and unloading of interstate shipments of goods into and from warehouses, is a part of interstate commerce: Walling vs. Jacksonville Paper Co. supra; Baltimore & Ohio R.R. vs. Brich, 263 U.S. 540, 544; Cleveland & St. L. Ry vs. Pet Milk 339 U.S. 538, 595; Federal Trade Commission vs. Pacific Paper Co. 273 U.S. 52; Brennan vs. Titusville, 153 U.S. 289; Mozier vs. Alabama, 218 U.S. 124.

(f) Because in such cases, even where "a substantial part" of an employee's work is devoted to transactions in interstate commerce, they come within the provisions of the Act, and the decisions of the courts below cannot be reconciled with: Walling vs. Goldblatt Bros. 123 F. (2) 778 (6); Walling vs. American Stores 133 F. (2) 840 843; Davis vs. Goodman, 133 F (2) 52.

(g) The volume of interstate shipments and business in a given case is not material in determining the applicability of the Act. In the case of U.S. vs. Darby, 312 U.S. 100, 122, a case — incidentally originating in the same District Court and brought by his Honor the present District Judge, then a practicing attorney — the Fair Labor Standards Act was attacked as being unconstitutional

upon several grounds. In construing the intention of the Congress this court held:

"Congress to attain its objective in the suppression of Nation wide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume, or the amount of shipments in commerce, or of production for commerce, by any particular shipper or producer, it recognized that in present day industry competition by a small number may affect the whole, and that the total effect of competition of any may be great".

(h) The decision of the trial Court as to the volume of defendant's wholesale business in commerce rests upon hearsay and the opinions of the employer, and disregards the positive documentary and other proofs submitted by petitioner.

(i) Petitioner was precluded from proving the volume of defendants wholesale business done in commerce by said ruling of the trial court holding that such evidence was "cumulative", and petitioner was thereby deprived of a fair and impartial trial, contrary to the Constitution and laws of the country.

9. Accompanying Documents

A certified copy of the transcript of the record of the proceedings had in the District Court and in the Circuit Court of Appeals is herewith presented.

WHEREFORE petitioner respectfully prays that a writ of certiorari issue under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the 5th Circuit directing said Court to certify and send up to this Court upon a day to be designated, for its review and determination, a full and complete transcript of all proceedings in said Circuit Court of Appeals in the case entitled George Harris, et al, Appellant, vs L.L. Hammond, operating and doing business as L.L. Hammond & Company,

ppellee, No. 10841; that the decision of said Circuit Court of Appeals rendered on the first day of November 1944, be reversed and that the judgment of said District Court be reversed, and that a judgment be rendered by this Honorable Court in accordance with the law and the facts; that petitioner may have such other and further relief as may appear to be just.

And your petitioner will ever pray, etc.

Dated Augusta, Georgia, January 27, 1945.

[illegible], Individually
and as Agent of Ellis Chaniel.

James Franwick Chance

and Reasevant Chance,
Attorney for Petitioner.

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